



Federal Communications Commission
Washington, D.C. 20554

September 1, 2009

DA 09-1985

Charles Button
City of Bentonville
117 West Central Avenue
Bentonville, AR 72712

Attn: Charles Button

In re: Request for Waiver and application for notification of construction (FCC File Number 0002934547) for WPSG727 (Master to Remote) Path 1 and (Remote to Master) Path 2.

Dear Mr. Button:

On March 5, 2007, you filed an application for notification of construction on behalf of the City of Bentonville.¹ Although you indicated on the FCC Form 601 that you were requesting a waiver, there was no waiver attached indicating which Rule Section(s) you were asking to be waived or explaining the circumstances justifying a waiver. Our records show a previous request for an extension of the construction build-out deadline for these paths was granted on October 01, 2002 thus extending the construction deadline to October 19, 2003.² Your application for notification of construction was filed on March 5, 2007 and states that the paths commenced operation on July 11, 2006, therefore the construction of microwave paths for WPSG727 (Master to Remote) Path 1 and (Remote to Master) Path 2 was completed after the construction deadline. Your application provides no explanation as to the reason for the untimely construction and subsequent untimely notification. For the reasons stated below, we deny the waiver request, dismiss the notification of construction, and update the Commission's records to reflect that the license has terminated.

Section 1.946 requires that if a licensee fails to commence service or operations by the expiration of its construction period its authorization terminates automatically, without specific Commission action, on the date the construction or coverage period expires.³ Section 1.946(e) sets out the process for licensees to request an extension of a construction period or coverage period by filing FCC Form 601.⁴ The rule requires such a request to be filed before the expiration of the construction or coverage period.

Station WPSG727 and the associated Path 1 and Path 2 all share an April 19, 2001 first use date and an extended construction deadline of October 19, 2003.⁵ We did not receive your Notification of Construction until March 5, 2007, almost three years and five months after the extended construction deadline.

¹ See File Nos. 0002934547 (filed March. 05, 2007) (Notification of Construction with Request for Waiver).

² See File Nos. 0001042828 (filed Sept. 30, 2002) (Request for Extension of Construction Deadline).

³ See 47 C.F.R. § 1.946(c).

⁴ 47 C.F.R. § 1.946(e).

⁵ See File No. 0000354382; Wireless Telecommunications Bureau Site-By-Site Action, *Public Notice*, Report No. 839 (rel. April 25, 2001). See also 47 CFR § 101.63(a) ("Each Station ... authorized under this part must be in operation within 18 months from the initial date of grant.")

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Pursuant to Section 1.925 of the Commission's Rules, we may grant a waiver if it is shown that either: (1) the underlying purpose of the rule would not be served or would be frustrated by application to the instant case, and that a grant of the requested waiver would be in the public interest; or (2) in view of unique or unusual factual circumstances of the instant case, application of the rule would be inequitable, unduly burdensome, or contrary to the public interest, or the applicant has no reasonable alternative.⁶ In this case, we conclude that City of Bentonville has failed to make the requisite showing that grant of a waiver is warranted under the circumstances presented. Under legal precedent, "[a]n applicant for waiver faces a high hurdle even at the starting gate. When an applicant seeks a waiver of a rule, it must plead with particularity the facts and circumstances which warrant such action."⁷ City of Bentonville provided no justification for waiting to file its request for waiver more than three years and five months after its construction deadline. The Commission has emphasized that requiring licensees to file extension requests on a timely basis serves important policy objectives, and the Commission has upheld the dismissal of untimely requests for extension.⁸ By operation of the Commission's automatic termination rule, the authorization for Station WPSG727 and the associated Path 1 and Path 2 terminated on October 19, 2003. Accordingly, we deny the waiver request and update our licensing records to reflect that Station WPSG727 and its associated paths are no longer valid because the authorization to operate that Station terminated automatically on October 19, 2003.

If City of Bentonville wishes to continue operating the terminated facilities, it must file a completed FCC Form 601, in accordance with all applicable Commission Rules, to reauthorize the facilities. If the application meets the criteria specified in Section 101.31 of the Commission's Rules, City of Bentonville may operate the facilities conditionally as soon as the application has been properly filed. In the interim, City of Bentonville should file a request for Special Temporary Authority, in accordance with Section 1.931 of the Commission's Rules, if it wishes to continue operating the facilities.

Accordingly, IT IS ORDERED that pursuant to Sections 4(i) and 309 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 309, and Sections 1.946 and 101.63 of the Commission's Rules, 47 C.F.R. §§ 1.946, 101.63, the request for waiver filed by City of Bentonville on March 5, 2007 IS DENIED.

IT IS FURTHER ORDERED, pursuant to Sections 4(i) and 309 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 309, and Sections 1.934, 1.946 and 101.63 of the Commission's Rules, 47 C.F.R. §§ 1.946, 101.63, that the licensing staff of the Broadband Division of the Wireless Telecommunications Bureau SHALL DISMISS the notification of construction filed by City of Bentonville on March 5, 2007 (File No. 0002934547).

⁶ 47 C.F.R. § 1.925(b)(3).

⁷ *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969) (*WAIT*).

⁸ Nathan Sherman Enterprises, Inc., Lubbock SMR, Inc., S&C Investments, Inc., Triangle Communications, Inc., Mobilecom One, L.L.C., Hawaiian Wireless, Inc., HBS Communications, Inc., SRI, Inc. and Spectrum Resources of the Northeast, Inc., *Order*, 16 FCC Rcd 11150 (2001) ("As a general matter, allowing the filing of untimely extension requests... would undermine orderly and efficient spectrum management, lead to administrative uncertainty and delay, and hinder [the Commission's] ability to relicense scarce spectrum resources to other licensees who are ready and able to construct"); *see also* Interstate Power and Light Co., *Order*, 18 FCC Rcd 11051 (WTB PSPWD 2003).

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IT IS FURTHER ORDERED that the licensing staff of the Broadband Division of the Wireless Telecommunications Bureau SHALL TERMINATE the authorization for Station WPSG727 and associated Path 1 and Path 2 in accordance with this letter and the Commission's Rules.

This action is taken under delegated authority pursuant to Sections 0.131 and 0.331 of the Commission's Rules, 47 C.F.R. §§ 0.131, 0.331.

Sincerely,

Stephen Buenzow
Deputy Chief, Broadband Division
Wireless Telecommunications Bureau